Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GEOFFREY T. MOTT,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May an attorney be disciplined, consistent with due process, based upon an affidavit from a former client, alleging that the attorney misused certain funds, where the attorney disputed the affidavit's claims in a verified answer and affirmation, no evidence respecting the alleged misuse was adduced at the hearing that resulted in the discipline and the Grievance Committee conceded before the Appellate Division and the New York Court of Appeals that the referee based his findings upon an affidavit that was not part of the evidentiary record?

2. May an attorney be disciplined, consistent with due process, where it was specifically alleged in the petition that he violated fiduciary obligations imposed upon him as seller's attorney in a real estate contract when the referee found and the contract provided that petitioner represented the buyer and it was conceded by the Grievance Committee that the contract did not impose fiduciary obligations upon petitioner as alleged in the petition.

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Geoffrey T. Mott respectfully petitions this Court to issue a writ of certiorari to review the decision of the New York Court of Appeals.

OPINION BELOW

The decision of the Appellate Division, Second Department is reported as *In re Mott*, 309 N.Y. A.D.2d 162. 765 N.Y.S.2d 383 (2d Dept. 2003) and is reproduced in the Appendix to this Petition ("App.") at 1a. The order denying reargument or leave to appeal is unpublished and is reproduced at App. 6a. The order of the New York Court of Appeals denying the leave to appeal is not reported and is reproduced at App. 8a.

STATEMENT OF JURISDICTION

The decision of the New York Court of Appeals denying leave to appeal was entered on June 29, 2004. The Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitutional Amendment XIV provides, in part, "nor shall any State deprive any person of . . . property, without due process of law . . ."

STATEMENT OF THE CASE

Introduction

Petitioner was disbarred in New York on the basis of the determination by the referee, and adopted by the Appellate Division, that the evidence established by a preponderance of evidence that petitioner failed in two instances to preserve client funds in his escrow account.

The evidence presented in the first matter, ("Javaherian"), consisted of the pleadings that included as an exhibit an affidavit from the client who did not testify at

the trial and bank statements that were entered into evidence on consent. Charge one, paragraph 10 of the petition alleged: "Complainant, Ira Javaherian, denies giving Respondent authority to utilize his twenty thousand dollars. ($20,000)." Paragraph 11 of charge one provided: "[a] true copy of the Affidavit of Ira Javaherian is attached as Exhibit D." No one testified at trial. The Grievance Committee rested after bank records were admitted into evidence.

Petitioner's motion to strike and exclude the affidavit from the record was denied on two occasions by the referee. Petitioner's motion for judgment dismissing the charge at the conclusion of petitioner's case was also denied by the referee. The referee sustained the charge that petitioner was not authorized to remove the funds. He ruled, "Ira Javaherian, *in his affidavit* denies ever giving respondent his permission or consent to use these funds." (Report at p. 5) (emphasis added).

Petitioner argued before the Appellate Division that this determination of wrongdoing was based solely upon a hearsay affidavit not admitted into evidence. Petitioner maintained that he was being tried by affidavit and was denied the opportunity to confront and cross-examine the witness. The Appellate Division did not address this constitutional argument in its decision. Instead, the Court repeated the constitutional error and relied upon that same affidavit in ruling that, "[m]oreover, Ira Javaherian denied giving the respondent the authority to utilize the funds." App. 2a. No one testified at this hearing on this matter. The conclusion that Javaherian did not authorize the withdrawal of the funds was based upon the affidavit of Javaherian. Accordingly, petitioner was disbarred on the basis of the content of an affidavit attached to the petition that the referee, the Appellate Division and the Court of Appeals refused to exclude from

the proceedings. This is the violation of procedural due process for which petitioner seeks relief from this Court.

In the second matter ("Sussman") the Grievance Committee alleged that petitioner represented the seller, Sussman, and was the fiduciary named in a real estate contract. It was alleged that in that capacity petitioner failed to comply with the fiduciary obligations imposed upon him under this contract. The contract was in evidence, (petitioner's exhibit 1), and it proved that these allegations were false. Petitioner represented the buyer, the Galarzas, under the terms of the contract. The seller's attorney, Charles Bernstein, was the designated fiduciary under paragraph 6(a) of the contract. It was Mr. Bernstein who was imbued with the fiduciary obligations pursuant to this contract and not petitioner as alleged by the Grievance Committee in the petition.

The referee determined, and the Grievance Committee conceded, that petitioner did not represent Sussman as alleged in the petition. The referee never addressed the issue that the contract did not designate petitioner the fiduciary as alleged in the petition or that the Grievance Committee failed to prove the allegations it made in the petition. The referee sustained the charge nonetheless.

The Grievance Committee conceded in its Motion to Confirm the Report of the Referee before the Appellate Division that petitioner was neither the seller's attorney nor the designated fiduciary under the contract as alleged in the petition. The Grievance Committee argued that despite the fact that it could not prove petitioner represented the seller or that the contract imposed fiduciary obligations upon petitioner as alleged, petitioner could and should be found guilty of wrongfully withdrawing the funds under different facts and a different theory than those alleged in the charging

petition. This is the source of petitioner's constitutional deprivation. It is here where petitioner's constitutional rights delineated in *In re Ruffalo*, 350 U.S. 544 (1968) were violated. The Grievance Committee sought to disregard the allegations that it could not prove and to amend them in the petition so that they conformed with the evidence adduced at trial.

The Grievance Committee argued in its post-trial submission to the Appellate Division for the first time that the allegations in the petition should be disregarded and the charge sustained under a new theory. It argued that petitioner should be considered an "escrowee in fact" who represented the buyers. In essence, petitioner was arguing that the contract in evidence should be judicially re-written so that the clear fiduciary duties imposed upon the seller's attorney, Bernstein, could then be transferred to petitioner in his newly designated role as "escrowee in fact." The Grievance Committee urged all this upon the referee after the trial was over, after the testimony was heard and the evidence received and after petitioner defended himself against the specific charge that he represented the seller and violated fiduciary obligations imposed upon him in the contract of sale.

The essential due process argument made herein is that the new theory of liability, together with the "revised" contract imposing the fiduciary obligations upon petitioner as "escrowee in fact" do not resemble in any manner the allegation brought in the petition. Petitioner denied the allegations brought in the petition that he represented the seller or was the fiduciary and referred the Court to the contract. The burden then shifted to the Grievance Committee to prove those allegations. If it could not prove the allegations the referee should not have sustained the charge.

The referee sustained the charge not on the basis that petitioner was the fiduciary named in the contract who violated his fiduciary obligations imposed upon him under this contract. The referee merely found that petitioner received the funds and removed the funds from his account without permission. Petitioner testified to these facts and swore under oath that Sussman permitted him to withdraw those funds.

Petitioner relied upon the Supreme Court's decision, *In re Ruffalo*, 350 U.S. 544 (1968) in argument before the Appellate Division after the referee sustained the charge. The Appellate Division ignored the constitutional argument and simply repeated the allegations of the charge in its disbarment order as if they were the facts found in the proceeding by the referee or even asserted by the Grievance Committee. The Appellate Division ruled that petitioner should be disbarred based upon the fact that petitioner represented the seller, Sussman. App. 3a. This conclusion was made despite the fact that the referee found, the contract provided and the Grievance Committee maintained that petitioner represented the buyers and not the seller.

The Appellate Division also found that petitioner was the "fiduciary pursuant to the contract of sale," (App. 3a), a fact not argued by the Grievance Committee at the conclusion of the trial and a conclusion contradicted by the plain language of the contract. Finally, the Court found that petitioner "was required under this contract to hold the down payment in an interest bearing account" and "before his fiduciary obligations were discharged" he removed the funds without permission. App. 3a.

These finding were made despite the fact that the Grievance Committee conceded before the Appellate Division that the "testimony given and the evidence provided

established that Respondent represented the buyers . . . and the language of the Contract of Sale (Petitioner's Exhibit No. 1, Para. 6) calls for the Seller's attorney to act as escrowee. . . ." (Grabowski Affirmation in Support of Motion to Confirm at para. 4.) Accordingly, petitioner has been disbarred despite the fact that the allegations in the charge that petitioner represented the seller and violated fiduciary obligations imposed upon him pursuant to this contract, were admittedly not proven. It is this due process violation for which petitioner seeks relief from this Court.

Pursuant to Rule 14 of the Court the following is the specification of the stage in the proceedings when the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts.

THE JAVAHERIAN MATTER:

At the hearing no one testified. Respondent rested after the bank records were introduced into evidence on consent. The Referee stated in his Report that other than the bank records "no other evidence or testimony on this charge was presented before me by either the petitioner or respondent. Therefore, the Court must consider the pleadings in this proceeding, together with the exhibits annexed thereto, in its findings." (Report at 4-5).

Petitioner objected to the affidavit of Javaherian that was annexed to the petition as Exhibit D as evidence to be considered by the referee. Counsel argued at the trial:

> I would then move to strike from that Petition Exhibit D, and paragraphs 10 and 11 of Charge One. Those refer to an affidavit of a Complainant. That complainant is not here; he has not testified; and therefore any consideration of his affidavit

> or what he may have said as in Paragraph 10 of the petition should not be considered by this court, and I would request that it be stricken. Not having him here, I cannot cross-examine him, and I am—therefore, my client is denied his right to cross-examine witnesses . . .

(tr. 242-43).

The referee denied the motion to strike the affidavit from the petition and from consideration as evidence without explaining his reasons. (tr. 245).

At a subsequent court appearance appellant moved before the referee for judgment dismissing charge one on the grounds that petitioner was denied the due process of law:

> And therefore it would be my position that the Respondent's constitutional rights to due process, a fair trial, to be confronted by the witnesses against him, have been denied, both State and Federal, and therefore I would request that charge one be dismissed.

(tr. 259-60).

The referee denied the motion concluding that "I don't believe I have the right or authority to summarily now dismiss a charge." (tr. 268).

Respondent argued in the post-trial memorandum submitted to the referee that the refusal to strike the hearsay Javaherian affidavit from the petition and to preclude consideration of the affidavit by the referee as evidence would operate to deny petitioner of the due process of law. Petitioner argued:

> [i]n view of Mott's denial and specific allegation of consent, the production of bank statements

> showing withdrawals is absolutely insufficient to show a violation of any DR. DR 9-102 is a prohibition on the unauthorized removal of funds, not the removal of funds from an account. . . . There is not a scintilla of proof whatsoever that the client did not consent to the withdrawals and use of the funds except for the affidavit from Ira Javaherian which Petitioner annexed to its Petition. Request was made and denied that this affidavit be stricken and not considered on the matter. This affidavit is hearsay and can not be considered or used in this hearing as it violates Respondent's rights to Due Process, to confront witnesses against him and to cross-examine and to test the truthfulness and veracity of the witness.

(Post Trial Memorandum p. 2-3).

The referee found that respondent misused the escrow funds without obtaining the consent of his client, Ira Javaherian. He specifically referred to the affidavit as evidence of the lack of consent. The referee stated in his report, "Ira Javaherian, in his affidavit denies ever giving respondent his permission to consent to use these funds. Exhibit D, paras. 3-7)." Report at p. 5.

Respondent raised the due process argument again in the Memorandum of Law in Opposition to Motion to Confirm Report where he argued:

> Petitioner attached to the Petition an affidavit from a complainant (Javaherian) who did not testify. Respondent objected to that affidavit on hearsay grounds. (tr. 242-245). The exhibit should not be evidence in this proceeding but when asked not to consider it the Referee refused. (tr. 245).

> The Referee then referred to the Javaherian affidavit in the Report . . . respondent was denied the fundamental right to confront and cross examine the witnesses who have alleged that respondent violated a disciplinary rule." (Memorandum at 3-4). . . . Respondent was confronted at the Hearing not by the complaining witness but by the affidavit of the absent witness. . . . Petitioner was denied the fundamental right to cross-examine Ira Javaherian to test his truthfulness about the allegations in Charge One and Two. (Memorandum at 15.). . . . [T]he failure by petitioner to call Ira Javaherian to testify not only resulted in its inability to establish a *prima facie* case. The failure denied respondent his due process right to confront and cross-examine the witness against him."

Memorandum of Law In Opposition at p. 16.

The Appellate Division did not address the constitutional argument in its disbarment order. App. 1a. The Court simply repeated the referee's finding that was based upon the affidavit: "[m]oreover, Ira Javaherian denied giving the respondent the authority to utilize the $20,000." App. 2a.

Appellant next moved before the Appellate Division on a Motion to Reargue or for Leave to Appeal, where petitioner raised the issue in the following manner: "Was Mott denied Due Process of Law when the Special Referee and this Court relied on the hearsay affidavit which denied that Mott had his permission to use the $20,000 in issue?" (Motion to Reargue at p. 1-2). Petitioner than specifically addressed the merits of the issue:

> In assessing this limited evidence, the Special Referee clearly understood that the affidavits and

> pleadings were contradictory as to whether Ira Javaherian authorized Mott to use the $20,000. Since no live testimony was taken on the issue, Charge One could not have been sustained solely on the basis of Ira Javaherian's hearsay affidavit (*Id.* at p. 4) . . . [O]nly the hearsay affidavit of Ira Javaherian supported the statement found in this Court's order that "Ira Javaherian denied giving the respondent the authority to utilize the $20,000." (*Id.* at p. 6).

Respondent, Grievance Committee, conceded in its Opposition to the Motion for Reargument that the referee improperly based his findings upon the hearsay affidavit of Ira Javaherian that was not in evidence. To her credit, counsel acknowledged to the Court:

> With respect to Charge One of the Petition . . . admittedly, the referee based his findings upon the affidavit of Ira Javaherian which was not part of the evidentiary record.

Grabowski Affirmation in Opposition at para. 4

Therefore, there was no opposition to petitioner's argument before the Appellate Division that petitioner's due process rights were violated in this proceeding when the referee refused to exclude from evidence an affidavit from the absent client, and then based his findings upon that affidavit. Despite this fact, the Appellate Division denied the motion without decision on October 6, 2003. App. 6a.

Petitioner moved for leave to appeal to the New York Court of Appeals. Petitioner relied upon *Matter of Eldridge*, 82 N.Y. 161 (1880), the seminal case on due process requirements in disciplinary proceedings, and referred to its holding:

> On the trial he is not to be buried under affidavits or swamped with hearsay, but is entitled to

> confront the witnesses, to subject them to cross-examination, and to invoke the protection of wise and settled rules of evidence. In adopting this conclusion we only secure the members of the bar the common rights and ordinary privilege of the citizen.

Id. at 167-68. (Motion For Leave to Appeal at p. 15).

Petitioner argued on the motion:

> The special referee completely ignored the holding in *Eldridge*. Instead of insisting on live testimony and admissible evidence to support Charge One of the petition, the referee, over respondent's objection, accepted and adopted contentions made by Ira Javaherian in a prior affidavit annexed to the petition as Exhibit D. *Id.* Without explanation the Appellate Division upheld the referee's finding on Charge One, even though it was clear from the record that the finding was based upon the hearsay affidavit of Ira Javaherian, and in the face of respondent's sworn prior denials.

(*Id.* at p. 18).

Respondent, Grievance Committee again conceded before the Court of Appeals that the referee erred in basing his findings upon the affidavit. Counsel stated, "[i]t is true that Petitioner-Respondent conceded, in argument before the Appellate Division, that one of the charges of misconduct sustained below was based in part on the Special Referee's consideration of an affidavit not admitted into evidence." (Guido Affidavit in Opposition to Motion for Leave to Appeal at para. 2).

For the second time and before a second court the Grievance Committee conceded that petitioner was disbarred in the Javaherian matter because the referee based his findings upon the affidavit of the client who did not testify in the proceeding. And for a second time a New York court let stand a disbarment order that even the Grievance Committee acknowledged was based not on live testimony but an affidavit that was attached to the petition. This is why petitioner argues herein that New York courts are unwilling to uphold, respect and protect the due process rights of attorneys in disciplinary proceedings.

The New York Court of Appeals denied the motion for leave to appeal, without decision, on June 29, 2004. App. 8a.

THE SUSSMAN MATTER:

Petitioner was disbarred by order of the Appellate Division based upon its findings in the Sussman matter that petitioner represented the seller, Sussman, in a real estate contract. App. 1a. The Court found that the contract imposed fiduciary obligations upon petitioner that required him to deposit funds into his escrow account and to disburse them in accordance with the terms of the contract. *Id.* The contract was admitted into evidence by the Grievance Committee as petitioner's exhibit 1. The contract simply does not represent what the Court found.

Petitioner is not identified as the seller's attorney in the contract. He is designated the attorney for the buyer, Galarza. The referee found that petitioner represented Galarza. (Report at 9). More importantly, the contract imposed fiduciary obligations on Sussman's attorney, who is identified as Charles Bernstein ("Bernstein"). The referee also found that Bernstein represented Sussman. (Report at 9). Pursuant to

this contract Bernstein, and not petitioner, was required to deposit the escrow funds into an escrow account at Bank of New York and to disburse the proceeds at the real estate closing. (Exhibit 1, para. 6a).

How can an attorney be disbarred for violating fiduciary obligations imposed upon him as the seller's attorney under a contract where his is neither the seller's attorney nor the fiduciary named in the contract? This result was reached because petitioner's due process rights to a fair hearing were denied him.

The following references in the record are where petitioner preserved the argument that his constitutional right to due process was violated in the Sussman matter.

In Charge one, para. 1 of the Supplemental Petition, respondent alleged that petitioner represented Arlene Sussman. and "was entrusted as a fiduciary with $16,000 to be held by him in escrow until closing of title pursuant to the contract of sale." *Id.* at para. 2. Petitioner denied these allegation in the verified Answer wherein he also "respectfully refer[red] the Court to the contract of sale as for the true and correct context thereof." (Answer at para. 23.) Once issue was joined it became the burden of the Grievance Committee to prove by a preponderance of evidence that petitioner represented Sussman, was the fiduciary designated by the parties under this contract and that he violated his fiduciary duties imposed upon him under this contract.

The contract was admitted into evidence by the Grievance Committee as petitioner's exhibit 1. On page four of the contract Charles Bernstein is identified as the escrowee and the attorney for the seller, Arlene Sussman. Geoffrey T. Mott, P.C. is identified as the attorney for the buyers, the

Galarzas. Paragraph 6(a) of the contract provides that "the Seller's attorney ("Escrowee") shall hold the Downpayment for Seller's account in escrow in a segregated bank account at Bank of New York until Closing or sooner termination of this contract. . . ." At the conclusion of the trial the referee found that petitioner represented Galarza and did not represent Sussman as alleged in the petition. The referee found that Sussman was represented by Bernstein. (Report at 9.)

Petitioner argued in the Memorandum of Law In Opposition to the Motion to Confirm the Referee's Report, that "[i]t is alleged that respondent represented and had a fiduciary obligation as escrowee under the written contract that respondent later violated. The written contract did not impose this obligation upon him." *Id.* at 23.

Counsel for the Grievance Committee conceded in its Reply Affirmation that the contract in evidence proved that petitioner was the attorney for the Galarzas and not Sussman as alleged in the petition. The Grievance Committee also conceded that petitioner was not the escrowee named in the contract. Respondent urged the referee to ignore the allegations in the petition and find petitioner guilty of wrongdoing because he represented the Galarzas and acted as an "escrowee in fact." Counsel argued:

> The testimony given and the evidence provided established that respondent represented the buyers, Elizabeth and Juan Galarza. Petitioner notes that although the language of the Contract of Sale (Petitioner's Exhibit #1, Para. 6) calls for the Seller's attorney to act as escrowee, here, Respondent, by his acceptance of the down payment monies and the deposit of them into his escrow account acted as escrowee in fact.

Reply Affirmation at para. 4.

The Appellate Division, without explanation and contrary to the position of both parties and the finding of the referee, ruled that petitioner represented Sussman. App. 3a. The Court recited the remaining allegations of charge one of the Supplemental Petition as if they were proven at the hearing and found by the referee. The Appellate Division ruled that respondent was the fiduciary under the contract who was required to hold the down payment until the closing pursuant to the contract and failed to do so in violation of the fiduciary obligations imposed on him by this contract. App. 3a.

Petitioner raised this due process argument in the Motion to Reargue the Appellate Division decision. Petitioner argued:

> As noted, although the Special Referee found that the Galarzas were Mott's clients in the transaction, the Supplemental Petition (para. 1) charged that Sussman was Mott's client in the transaction. Moreover, the contract of sale . . . required Sussman's attorney to hold the deposit in escrow, not Mott. The Special Referee thus found Mott guilty of a charge not pled. Compare *In re Ruffalo*, 390 U.S. 544 (1968), reversing on Due Process grounds a disciplinary ruling against an attorney where the hearing panel amended their charges during the hearing based upon the attorney's testimony: "Disciplinary proceedings are adversary proceedings of a quasi-criminal nature. *Cf. In re Gault*, 387 U.S. 1, 33. The charges must be known before the proceedings commence. They become a trap, when, after they are underway, the charges are amended on the basis of the testimony of the accused." 390 U.S. at 551. *Accord*, *Committee v. Johnson*, 447 F.2d 169, 173-4 (3rd

> Cir. 1971) (finding Due Process violation where attorney was charged with violating rights of alleged clients Richardson and Santana but was found after hearing to have violated rights of admitted client Cutchin.)

Motion to Reargue, Stark Affirmation at para. 30.

In response to this argument the Grievance Committee maintained that it did not matter who it alleged petitioner represented or even if he represented both parties. For the Grievance Committee, "the question whether Respondent represented the seller and the issue raised alleging misconduct not pled, similarly do not involve issues necessary to resolve the ultimate question. Regardless of whether Respondent represented the seller or purchasers of both, Respondent as an escrowee was a fiduciary to both parties." *Id.* at para. 10.

The Appellate Division denied the motion to reargue –without opinion. App. 6a.

Petitioner repeated this claim in the Motion for Leave to Appeal to the New York Court of Appeals:

> Although the petition alleged that respondent was Sussman's attorney . . . the contract of sale provided that Mr. Mott was the attorney for Galarza . . . and the referee so found. The Appellate Division, however, sustained the misconduct charge against Respondent based in part upon its unexplained finding that respondent had represented Sussman in the transaction. . . . The Appellate Division sustained the referee's findings of misconduct. . . . In so doing, the court necessarily rejected respondent's contention that he had been "denied the due process of law in these proceedings. *Id.* at 10 . . . petitioner opposed

reargument on only one ground: it argued, through counsel, that even if the $16,000 was Sussman's money, nevertheless the charges should be sustained because the Galarzas did not approve the use of the money. Respondent's reply squarely answered the contention, as follows:

> If the $16,000 was money of Sussman and if Sussman authorized Mott to use that money, and if the Galarzas could not have been harmed by reason of that direction, then surely Mott's use of those funds should not result in his disbarment. As shown above, the Galarzas had no beneficial interest in the $16,000 and hence Mott was entitled to rely on Sussman's authorization for him to use the funds. . . . We have found no case in which an attorney's use of escrow funds was held to be an offense punishable by disbarment where the use was authorized by the only party with a beneficial interest in the escrow. . . . Particularly where, as here, the record demonstrates that the respondent has obtained successful treatment for the psychological conditions which had led him to borrow funds from his clients, the respondent is not unfit to practice law. Cf. *In re Wechsler*, 165 A.D.2d 39 (1st Dept. 1991).

Reply Affirmation at 12.

The Court of Appeals denied the Motion for Leave to Appeal without decision. App. 8a.

REASONS FOR GRANTING THE PETITION

New York Courts Will Not Protect, Uphold and Defend the Right of An Attorney to the Due Process of Law In Disciplinary Proceedings

The United States Supreme Court has ruled that disciplinary proceedings are "adversary proceedings of a quasi-criminal nature" and attorneys must be afforded procedural due process in disciplinary proceedings under the Fourteenth Amendment to the Constitution. *In re Ruffalo*, 390 U.S. 544, 559 (1968). Fundamental to the concept of due process and a fair trial is adequate notice of the charges. *In re Wall*, 13 F. 814, 815 (S.D. Fla. 1882). The charges are not to be changed during the proceedings based upon the evidence adduced at trial. *In re Ruffalo, supra.* Consistent with due process in disciplinary proceedings, attorneys have a right to confront and cross-examine the witnesses against them, *In re Oliver*, 333 U.S. 257 (1968), in proceedings where the settled and wise rules of evidence are applied. *Ex parte Burr*, 22 U.S. 529 (1824). The attorney may only be disciplined when the State has met its burden of proof and has proven the very allegations contained within the charging petition. *Randall v. Brigham*, 74 U.S. 523 (1868).

The New York Court of Appeals has described due process in disciplinary proceedings in *In re Eldridge*, 82 N.Y. 161, 167-68 (1880) in this matter:

> Upon the return of that order the accused ...may confess, he may confess, he may explain, he may deny. . . . [I]f he meets the accusation with denial, the issue thus raised is to be tried, . . . and on that trial the accused is not to be buried under affidavits or swamped with hearsay, but is entitled to confront the witnesses, to subject them to cross-

> examination, and to invoke the protection of wise and settled rules of evidence. In adopting this conclusion we only secure to the members of the bar the common rights and ordinary privileges of the citizen. *Id.*

In this same decision the Court of Appeals warned "[t]o say that when an attorney denies the charges against him, he may be tried without the rights and safeguards which belong to the humblest criminal, would be to adopt a dangerous rule, and one without reason and justification." *Id.*

The case presented on this Writ of Certiorari highlights such a case that adopts a dangerous rule that is without reason and justification in law. A dangerous rule without reason and justification is established herein because New York has disbarred an attorney where the sum total of the evidence tendered by the Grievance Committee at the trial in the Javaherian matter discussed below was the pleadings, that included an affidavit from the client denying that he gave permission to petitioner to withdraw funds, and a bank statement. The Grievance Committee rested on this "evidence" and the Court entered an order disbarring petitioner without a single witness being called. There is no reason or justification under law for disbarring an attorney on the basis of an affidavit and a bank statement. The Appellate Division and the New York Court of Appeals have refused to vacate the determination even though the Grievance Committee conceded before each tribunal that the referee based his findings on an affidavit that was outside the evidentiary record.

The Appellate Division and the New York Court of Appeal also ignored the procedural due process rights of petitioner in the Sussman matter inasmuch as these courts

have ignored and refused to apply the procedural due process requirements announced in *In re Ruffalo*, 350 U.S. 544 (1968). In Sussman, petitioner was disbarred based upon the allegations appearing in the petition that he represented the seller in a real estate contract and was the fiduciary named in the contract. It was alleged that petitioner violated those contractually imposed fiduciary duties. However, the contract in evidence revealed that petitioner represented the buyer (and the Referee so found) and was assigned no fiduciary responsibility under this contract. The fiduciary obligations alleged to have been violated by petitioner were, under this contract, imposed upon the seller's attorney and not petitioner. This crucial fact did not bear on the proceedings at all. Petitioner was disbarred by order of the Appellate Division in which the court found petitioner represented the seller and violated fiduciary obligations imposed upon him pursuant to the contract of sale. Accordingly, an attorney in New York can be disbarred even after it is established that the Grievance Committee did not and could not prove the allegations contained in the charge.

A) The Appellate Division and the Court of Appeals Refused to Vacate or Amend the Disbarment Order Even After the Grievance Committee Conceded Before Both Courts that the Findings of the Referee Were Based Upon an Affidavit Outside the Evidentiary Record.

The Grievance Committee had the burden to prove by a preponderance of evidence that petitioner withdrew the funds from his escrow account without the authority of Ira Javaherian. *In re Capoccia*, 59 N.Y.2d 594 (1983). The evidence in disciplinary proceedings must be "legally admissible evidence." N.Y. Jud. L. § 90 (6-a), *In re Eldridge*, *supra*.

Paragraph 10 of the petition alleged that "[c]omplainant, Ira Javaherian denies giving Respondent the authority to utilize his $20,000." Paragraph 11 of the petition provided that "[a] true copy of the Affidavit of Ira Javaherian is attached as Exhibit D." The referee recognized in his Report that other than the verified pleadings and bank documents "no other evidence or testimony on this charge was presented." (Report at 4.) He nevertheless found that respondent misused the escrow funds without obtaining the consent of his client, Ira Javaherian, citing the affidavit attached to petition. *Id.* The Appellate Division, despite petitioner's arguments that the reliance upon the Javaherian affidavit amounted to a deprivation of due process, proceeded to repeat the constitutional error. The Appellate Division relied upon the affidavit for its finding that "Ira Javaherian denied giving the respondent the authority to utilize the funds." App. 2a. It is plain that petitioner was tried, found guilty, and disbarred on the basis of an affidavit.

It is settled law in New York that an "attorney is not to be buried under affidavits or swamped with hearsay, but is entitled to confront the witnesses, subject them to cross-examination and to invoke the settled rules of evidence. *In re Eldridge*, 82 N.Y. 161, 167-68. (1880); *In re Wernick*, 128 A.D.2d 260, 263 (1st Dept. 1987). A hearsay affidavit is inadmissible in evidence in a disciplinary proceeding if, as here, it is objected to during the proceeding. *Matter of Lynch*, 277 A.D. 477, 480 (1st Dept. 1930); *In re Yao*, 250 A.D.2d 221, 223 (1st Dept. 1998). Petitioner repeatedly and properly objected to the affidavit as evidence.

There was no opposition before the Appellate Division and the Court of Appeals by the Grievance Committee to petitioner's argument that he was denied the due process of law when the referee relied upon the affidavit and because

there was an absence of proof on the Javaherian charge. In its Affirmation in Opposition before the Appellate Division counsel for the Grievance Committee asserted, "admittedly, the referee based his findings upon the affidavit of Ira Javaherian which was not part of the evidentiary record." (Grabowski Affirmation In Opposition at para. 4.). Again before the New York Court of Appeals, counsel acknowledged, "[i]t is true that Petitioner-Respondent conceded, in argument before the Appellate Division, that one of three charges of misconduct sustained below was based in part on the Special Referee's consideration of an affidavit not admitted into evidence . . ." (Guido Affidavit in Opposition at para. 2).

When both parties to a disciplinary proceeding agree in argument before the Appellate Division and the New York Court of Appeals that an attorney's disbarment order was based upon a hearsay affidavit not within the evidentiary record and New York courts will still not correct that admitted constitutional violation, there is only conclusion that can be made. New York will not protect, defend, uphold or enforce the Fourteenth Amendment constitutional procedural due process rights of attorneys in disciplinary proceedings. For this reason, petitioner respectfully requests that this Court grant the writ of certiorari.

B) Petitioner Was Denied The Due Process of Law When He Was Disbarred Based Upon Allegations in the Petition That He Violated Fiduciary Obligations Imposed Upon Him Under A Contract When That Contract Imposed The Fiduciary Duties Upon Another Attorney.

The Supreme Court has determined that procedural due process requires that the charges in an attorney disciplinary proceeding be known before the proceedings commence and may not be amended during or after the proceedings on the basis of the testimony of the accused because under these circumstances, the charges become "a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge earlier statements and start afresh." *In re Ruffalo*, 355 U.S. at 550-51.

Petitioner was denied the procedural due process of process when the referee sustained the charge that petitioner violated specific fiduciary obligations imposed upon him under a contract when that contract imposed those fiduciary obligations upon another attorney. Petitioner was charged and found to have violated fiduciary obligations imposed upon him as the seller's (Sussman) attorney pursuant to a real estate contract in evidence. (Petitioner's exhibit 1). The allegations were denied in the verified Answer and petitioner referred the Court to the contract of sale. (Answer at para. 23).

Consistent with fundamental due process under the Fourteenth Amendment, the burden then shifted to the Grievance Committee to prove the allegations it made in the petition that were denied by petitioner. For example, petitioner denied that he represented the seller; denied that he was the fiduciary named in the contract and denied that he violated the fiduciary obligations allegedly imposed upon

him in this contract. This document was the basis of the charge that petitioner represented the seller, Sussman. It was also the source of the alleged fiduciary responsibility that petitioner allegedly failed to respect. However, the contract provided that petitioner was not the attorney for the seller, but the attorney for the buyer, Galarza. Moreover, the contract provided that Sussman's attorney, Charles Bernstein, was the fiduciary responsible for the escrow funds and not petitioner as alleged in the petition. Therefore, the contract proved conclusively that the essential allegations of the petition, namely, that petitioner represented the seller and violated fiduciary obligations outlined in the contract, were simply false.

The referee determined that petitioner represented the buyer, Galarza, and not Sussman as alleged in the petition. (Report at 9). He also found that the seller, Sussman, was represented by Charles Bernstein. *Id.* In his findings, the referee did not address the fact that the contract did not impose fiduciary obligations upon petitioner as alleged in the petition. Nor did the referee expressly find in his report that the Grievance Committee proved that petitioner represented the seller and was the named fiduciary under this contract. The referee merely determined that petitioner received the disputed funds, placed them in his account, the balance fell below $16,000, and petitioner removed the funds without authority.

The due process of law requires that before an attorney can be found guilty of violating his oath of office the proofs shall establish or conform to the specific allegations. *Randall v. Brigham*, 74 U.S. 523 (1868). A disciplinary proceeding is not a fact finding mission to determine *de novo* what transpired in a real estate transaction. The Grievance Committee claimed that it knew what happened and brought

specific charges alleging wrongdoing. It was time to prove those allegations at this trial. Moreover, consistent with the due process of law, the task of the referee was not to report facts and determine what occurred between the parties. Rather, the referee, as judge, was assigned to determine if the Grievance Committee proved by a preponderance of evidence the allegations in the charge that it brought. Absent from his report was a determination that the allegations in the Charge were proven or reasoning to suggest that the Grievance Committee met its burden and the charge should sustained on that basis.

The most significant allegations that were not and could not be proven at this hearing centered on the creation and alleged violation of fiduciary obligations by petitioner. The violation of a fiduciary obligation is the essence of the charge against petition. The Grievance Committee alleged that petitioner's fiduciary obligation arose by agreement of the parties and their attorneys and was reflected by the written contract between the parties. However, the contract imposed fiduciary obligations upon Charles Bernstein, the seller's attorney and not petitioner.

How can it happen, consistent with due process under the Fourteenth Amendment that an attorney is disbarred for violating fiduciary obligations allegedly imposed upon him under a contract when the contract imposed the fiduciary obligations upon another attorney? How can such a severe penalty of disbarment be meted out by the State where it is undisputed that the allegations in the petition were not proven? This result can only be accomplished where, as here, the due process of law is disregarded, the marked pleadings are ignored, and the referee excuses the Grievance Committee from the mandatory due process obligation to prove the allegations that it brought in the petition.

The Grievance Committee acknowledged after trial that it did not and could not prove that petitioner represented Sussman or that this contract imposed fiduciary obligations upon petitioner as alleged in the petition. On its Motion to Confirm before the Appellate Division, counsel argued that while the evidence adduced at trial did not prove the allegations made in the petition, petitioner could be found to have violated the disciplinary rules under factual allegations different than those in the petition and established at trial. Counsel reasoned:

> The testimony given and the evidence provided established that Respondent represented the buyers, Elizabeth and Juan Galarza. Pursuant to the Contract . . . the $16,000 down payment was to be held in escrow "until closing or sooner termination of contract" (Petitioner's Exhibit No. 1, Para. 6). Petitioner notes that *although the Contract of Sale* (Petitioner's Exhibit No. 1, Para. 6) *calls for the Seller's attorney to act as Escrowee*, here, Respondent, by his acceptance of the down payment monies and the deposit into his escrow account acted as escrowee in fact.

Grabowski Reply Affirmation at para. 4. (emphasis added).

The Grievance Committee acknowledged here that it could not prove that petitioner represented the seller or that the contract imposed fiduciary obligations upon him that he subsequently allegedly violated. It is noted that in the same paragraph the Grievance Committee identifies a fiduciary obligation in the contract and then admits that the contract imposed that obligation upon seller's attorney, Charles Bernstein. This is the very essence of petitioner's constitutional argument. Petitioner defended against the charge that he represented the seller and that he was a

fiduciary under this contract. After trial both sides agreed that petitioner did not represent the seller and was not the fiduciary in this contract. To get from this conclusion to the Appellate Division's disbarment order that found petitioner represented Sussman and violated fiduciary duties imposed upon him under this contract, defies rationality.

Whether or not petitioner could be considered an "escrowee in fact" as urged by the Grievance Committee post-trial should be irrelevant to the disciplinary proceeding. It is not the charge that petitioner received notice of, was not the charge made in the petition, or the charge denied by petitioner and defended against by him at his trial. The burden on the Grievance Committee, consistent with the due process of law, was not to "cut and paste" facts, allegations and possible theories of liability or wrongdoing after the trial in the hopes of matching the evidence at trial with newly amended charges. The charge was already made in the petition. The Fourteenth Amendment requires the State to prove that those allegations, the very allegations that petitioner denied in his Answer, are true by a preponderance of evidence before it disbars an attorney. *In re Brigham, supra.*

Respondent's effort to re-write the allegations in the petition after the trial, and the referee's determination to sustain the charge on facts not alleged in the petition, is what the Supreme Court ruled violated the procedural due process of law *In re Ruffalo, supra*; *see also Committee v. Johnson*, 447 F.2d 169 (3d Cir. 1971) (finding Due Process violation where attorney was charged with violating rights of alleged clients Richardson and Santana but was found after hearing to have violated rights of admitted client Cutchin.)

Petitioner argued before the Appellate Division that his due process rights were violated when the referee sustained a charge of wrongdoing on facts other than those alleged in

the petition. The Appellate Division, instead of addressing the constitutional argument, simply re-stated verbatim the allegations of the petition in its disbarment order decision as if those were the facts established in this proceeding. Thus, the Appellate Division disbarred petitioner in the Sussman matter on the basis that petitioner "represented Arlene Sussman", and was "entrusted as a fiduciary . . . pursuant to the contract of sale." App. 3a. The Court also found that the "contract of sale required respondent to hold the down payment . . . , and "before his fiduciary obligation had been discharged, the respondent converted and misappropriated the down payment . . . and at the closing respondent was obligated to release the down payment to his client, the seller." *Id.*

These are not the facts that the referee found or could reasonably be understood to have been representative of the evidence at trial. Moreover, the Grievance Committee acknowledged that the contract called for the Seller's attorney (Bernstein) to act as escrowee. There is no rational explanation on this record for the factual findings in the Appellate Division ruling. The referee, petitioner, the Grievance Committee and the contract were in agreement that petitioner represented Galarza. While the referee did not address the issue of who was named the fiduciary under the contract, the Grievance Committee, petitioner and contract were in agreement that it was Bernstein, Sussman's attorney, and not petitioner as alleged in the petition and as found by the Appellate Division.

Petitioner submits that it is clear from the record that petitioner was disbarred in the Sussman matter not because the Grievance Committee established and the referee found by a preponderance of evidence that the allegations in the petition were true. The Grievance Committee never argued

anything but that it could not prove petitioner represented Sussman or that he was the fiduciary under the contract. It appears that petitioner was disbarred only after the Referee ignored the marked pleadings, failed to insist that the Grievance Committee prove the allegations that it brought, and abandoned his function of determining whether petitioner met its constitutional burden of proving the allegations in the charge by a preponderance of evidence. The referee did not find that petitioner violated fiduciary obligations imposed upon him under a contract. Yet, that was what petitioner was charged with and that is what the contract proved to be false. Because petitioner was disbarred even after the Grievance Committee conceded that it did not prove the allegations in the charge, petitioner was denied the procedural due process guaranteed him under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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